COURT OF APPEALS
DECISION
DATED AND FILED

November 22, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP619 **Cir. Ct. No. 1998CF980151**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DEMITRIUS GOODLOW,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed*.

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Demitrius Goodlow appeals an order denying his postconvicton motion alleging ineffective assistance of postconviction counsel. Goodlow claims that postconviction counsel should have argued the trial court erroneously exercised its discretion by failing to explain why it sentenced him to

221 months' imprisonment for attempted armed robbery. Goodlow also argues postconviction counsel was ineffective for failing to challenge on appeal the trial court's conclusion that he was not entitled to a new trial based on newly discovered evidence. We reject Goodlow's arguments and affirm the order.

¶2 On January 5, 1998, Goodlow and co-defendant Silas Mason were attempting to rob a disabled man over sixty years of age outside a George Webb's restaurant in Milwaukee when two police officers on patrol in an unmarked car observed the attack and intervened. They observed Goodlow bearing a knife. At trial, Mason implicated Goodlow in the attempted robbery. Goodlow was sentenced to 221 months' imprisonment.

¶3 In November 1998, postconviction counsel filed a motion for a new trial or, in the alternative, a new sentencing hearing. The motion claimed, among other things, that Goodlow was entitled to a new trial because of newly discovered evidence. The motion contended that Mason recanted and was now saying he lied under oath at trial about Goodlow's involvement. The trial court denied the motion on all issues raised. The motion did not claim that the trial court erroneously exercised its sentencing discretion. This court affirmed Goodlow's conviction in a decision dated February 15, 2000, and his petition for review was denied.

¶4 In February 2005, Goodlow filed a postconviction motion pursuant to WIS. STAT. § 974.06,[1] claiming that postconviction counsel was ineffective for (1) failing to argue that the trial court erroneously exercised its discretion at

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

sentencing, and (2) failing to argue that the trial court did not determine whether it was reasonably probable that a different result would have been reached in a new trial based upon newly discovered evidence. The motion was denied on February 16, 2005. Goodlow now appeals from the order denying his § 974.06 motion.[2]

¶5 The analytical framework that must be employed in assessing the merits of a defendant's claim of ineffective assistance of counsel is well known. To sustain such a claim, a defendant must prove (1) deficient performance; and (2) prejudice. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Sanchez***, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996). A court need not address both components of this inquiry if the defendant fails to make a sufficient showing of either prong. ***Strickland***, 466 U.S. at 697. The standard for reviewing a claim of ineffective assistance of counsel involves mixed questions of law and fact. ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). We uphold findings of fact unless clearly erroneous. The ultimate conclusion as to whether counsel's performance was deficient and prejudicial is a question of law reviewed without deference. ***Id.*** at 127-28.

¶6 The first issue is whether postconviction counsel was deficient for failing to argue that the trial court erroneously exercised its discretion at sentencing. The three primary factors a sentencing judge must consider are the

[2] In his appeal to this court, Goodlow abandons several issues raised in his WIS. STAT. § 974.06 motion, including that the trial court erroneously exercised discretion by failing to explain why he added fourteen years to the presentence report's recommended sentence, and by failing to consider probation. Since Goodlow has failed to brief the alleged errors by the trial court, these claims are deemed abandoned. *See* ***State v. Ledger***, 175 Wis. 2d 116, 135, 499 N.W.2d 198 (Ct. App. 1993).

gravity of the offense, the character and rehabilitative needs of the defendant, and the need to protect the public. ***State v. Sarabia***, 118 Wis. 2d 655, 673, 348 N.W.2d 527 (1984). An erroneous exercise of discretion might be found if the trial court failed to state on the record the material factors which influenced its decision, gave too much weight to one factor in the face of contravening considerations, or relied on irrelevant or immaterial factors. ***Harris v. State***, 75 Wis. 2d 513, 518, 250 N.W.2d 7 (1977). The weight to be given to each of the factors, however, is a determination particularly within the discretion of the trial court. ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). The sentencing court may consider as part of these primary factors:

> the vicious or aggravated nature of the crime; the past record of criminal offenses; any history of undesirable behavior patterns; the defendant's personality; character and social traits; the results of a presentence investigation; the degree of the defendant's culpability; the defendant's demeanor at trial; the defendant's age, educational background and employment record; the defendant's remorse, repentance and cooperativeness; the defendant's need for rehabilitative control; the right of the public; and the length of pretrial detention.

State v. Borrell, 167 Wis. 2d 749, 773-74, 482 N.W.2d 883 (1992) (citations omitted).

¶7 Goodlow was facing a potential sentence of 360 months' imprisonment as a repeater. He had been arrested eleven times in Wisconsin and had used ten different aliases for those eleven arrests. Goodlow had six felony convictions in Wisconsin. The prosecutor recommended the same sentence for Goodlow as he recommended for Mason, somewhere in the range of twenty to twenty-five years.

¶8 At the sentencing hearing, the trial court stated that it took into consideration the nature of the offense, Goodlow's culpability and character, his need for close rehabilitative control, the rights of the victim, and the risks that he posed to the community. The court made the presentence report a part of the sentencing record, noting that Goodlow's character was reflected in that report. The court took into consideration Goodlow's record of past criminal offenses and a history of undesirable behavior patterns. Goodlow's counsel stated that Goodlow had a third grade reading level and that he needed education to bring him up to a functional level with job skills. The court agreed that Goodlow had such needs but stated that those needs had to be addressed in an institutional setting. The court concluded that Goodlow was in basically the same situation as his co-defendant, and imposed a sentence of 221 months.

¶9 The trial court considered the appropriate factors and imposed a reasonable sentence that was far below the maximum and even less than recommended by the prosecutor. The trial court need not explain why its sentence differs from any particular recommendation as long as it sentences within the permissible range set by statute. ***State v. Johnson***, 158 Wis. 2d 458, 469, 463 N.W.2d 352 (Ct. App. 1990). The trial court properly recognized that probation was not an option given the seriousness of the offense, Goodlow's deplorable prior record, and the need to protect the public. The crime was serious and involved a disabled person over sixty years of age. Goodlow failed to take advantage of probation given in the past and a significant prison sentence was warranted. The sentencing court did not erroneously exercise its discretion, and counsel was therefore not deficient for failing to raise the issue.

¶10 The next issue involves whether postconviction counsel was ineffective for failing to challenge on appeal the trial court's conclusion that

Goodlow was not entitled to a new trial on the basis of newly discovered evidence. Goodlow claims the trial court improperly failed to decide whether it was reasonably probable that a different result would be reached in a new trial.[3] The trial court stated that it was unnecessary to decide whether a different result would be reached because Mason's alleged recantation was not corroborated by other newly discovered evidence.

¶11 Motions for new trials based upon newly discovered evidence are not favorably received and are entertained with great caution. ***Erickson v. Clifton***, 265 Wis. 236, 240, 61 N.W.2d 329 (1953). The five general requirements for newly discovered evidence are well known and were set forth in ***State v. McCallum***, 208 Wis. 2d 463, 473, 561 N.W.2d 707 (1997). The defendant must prove by clear and convincing evidence, that: (1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking evidence; (3) the evidence is material to an issue in the case; (4) the evidence is not merely cumulative, and (5) it must be reasonably probable that a different result would be reached at trial. The defendant is not entitled to a new trial if the defendant fails to meet any of the above elements. ***State v. Sarinske***, 91 Wis. 2d 14, 37-38, 280 N.W.2d 725 (1979). When the newly discovered evidence contradicts prior sworn testimony, a sixth element is required. The newly discovered recantation must be corroborated by other newly discovered evidence. ***State v. Carnemolla***, 229 Wis. 2d 648, 661 n.4, 600 N.W.2d 236 (Ct. App. 1999).

[3] Because we conclude that it was not necessary for the trial court to decide the "reasonable probability of a different outcome" criteria of the newly-discovered evidence requirement, we need not determine whether Goodlow's claim of ineffective assistance should be one of appellate counsel rather than postconviction counsel, since it appears to involve allegations of what counsel failed to do in this court. *See* ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 677-79, 556 N.W.2d 136 (Ct. App. 1996).

¶12 It was not necessary for the trial court to rule on the requirement that it must be reasonably probable that a different result would be reached on a new trial unless Goodlow satisfied all of the ***McCallum*** elements plus the additional element for recantations. Goodlow did not satisfy those requirements.

¶13 First, Goodlow presented no new evidence to corroborate Mason's recantation.[4] As the court emphasized in ***McCallum***, there is sound reason to adhere to the requirement that recantation testimony must be corroborated by other newly discovered evidence. ***McCallum***, 208 Wis. 2d at 476. Recantations are inherently unreliable. The recanting witness is admitting that he lied under oath either during the original sworn testimony or the sworn recantation testimony. ***Id***. After the trial, Mason recanted in out-of-court statements and absolved Goodlow of any blame for the incident. As the trial court correctly observed, Mason had nothing to lose at that point, and Mason later advised Goodlow's attorney that "it would be his intention to exercise his right under the Fifth Amendment not to incriminate himself." The alleged recantation by Mason simply has no circumstantial guarantees of trustworthiness.

¶14 In addition, Mason's recantation not only exculpates Goodlow, but also himself because he claimed that he did not intend to rob the victim but only to panhandle from him. Mason claimed that he did not give Goodlow the knife, the weapon he had in his pocket was not there for any purpose, and that he simply threw it on the ground when he saw the police coming. Mason's statements are therefore not even statements against interest.

[4] This case did not involve the recantation by a victim, which involves the rule of corroboration discussed in ***McCallum*** for recantation by victims. *See* ***State v. McCallum***, 208 Wis. 2d 463, 477-78, 561 N.W.2d 707 (1997).

¶15 Nor is it reasonably probable that a different result would be reached at trial. The correct legal standard when applying the "reasonable probability of a different outcome" criteria with regard to recantation is whether there is a reasonable probability that a jury looking at both the accusations and the recantation would have a reasonable doubt as to the defendant's guilt. ***McCallum***, 208 Wis. 2d at 474. Credibility is crucial to the application of the proper legal standard, and the circuit court is in a much better position by close examination of the witness's demeanor to resolve the question of whether the recantation would raise a reasonable doubt in the minds of the jury. ***Id.*** at 480.

¶16 When Mason testified at trial, he admitted he had been convicted eleven times and told the jurors he had pleaded guilty to attempted armed robbery for which he expected consideration at sentencing in exchange for his truthful testimony in Goodlow's case. Mason testified at trial that he and Goodlow were riding around on January 5, 1998 looking for a victim to get money to buy drugs. Mason testified that he and Goodlow got out of the car when their victim got out of his vehicle and that Goodlow came up from behind "but he didn't get a chance to do anything to him" before the police intervened. Mason testified that he recognized Exhibit 1 (the knife found by the police) as a knife he gave Goodlow for purposes of carrying out the robbery.

¶17 Officer Richard Aztlan testified at trial that he was patrolling when he observed a black male grab the victim and shake him violently, while another black male, identified as Goodlow, approached from behind. He testified that the male approaching from behind grabbed the victim from behind and appeared to have a knife. The officers were able to stop the assault by drawing their service revolvers. The knife that Goodlow possessed was recovered from where he dropped it when confronted by the police. Officer Gary Cole also testified that he

saw Goodlow grab the victim from behind, and he identified the knife that Goodlow dropped. The victim also identified Goodlow as the person behind him in the George Webb parking lot when Mason grabbed him by the collar.

¶18 Given Mason's testimony at trial and the strong eyewitness testimony by the two police officers, Mason's recantation was deemed "wholly incredible" by the trial court. A finding that the recantation is incredible necessarily leads to the conclusion that the recantation would not lead to a reasonable doubt in the minds of the jury. ***Carnemolla***, 229 Wis. 2d at 660 (quoting ***McCallum***, 208 Wis. 2d at 475). Assuming Mason would testify, a jury looking both at the trial testimony and the recantation would not have a reasonable doubt as to Goodlow's guilt. Goodlow was not entitled to a new trial based on newly discovered evidence. Accordingly, there was no deficient performance and counsel was not ineffective for failing to challenge the trial court's ruling on his newly discovered evidence claim in Goodlow's direct appeal.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.